In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1163

ROSS SHADE,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

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BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Motion to Dismiss or Affirm

The Pacific Telephone and Telegraph Company (hereinafter called "Pacific Telephone"), appearing herein as an appellee,[1] moves the Court to dismiss the appeal herein for

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1. This corporation is the real party in interest against which appellant's attack upon the Public Utilities Commission of California is directed. It was a party to the proceedings before the Public Utilities Commission and participated therein. The challenged order of the Commission directly affects the service offerings of this company and the rates charged by it. Under California law it was entitled to appear and did appear in the proceedings

want of jurisdiction, or in the alternative to affirm the judgment, on the following grounds:

1. The appeal does not present a substantial Federal question.

2. The asserted "due process" and "equal protection" questions are not properly before this Court as not having been raised or passed upon by the court (here the Commission) below.

3. The judgment below is clearly correct under principles well settled by this Court.

OPINIONS BELOW

The Supreme Court of California on October 30, 1975, without decision or comment, denied appellant's Petition for Writ of Review (Jur. St., Appx. A)[2] of Decision No. 84374 of the California Public Utilities Commission (hereinafter called "the Commission") rendered on April 29, 1975, and Decision No. 84621 rendered on July 1, 1975, denying appellant's Petition for Reconsideration of Decision No. 84374. The decisions of the Commission are not yet officially reported.[3]

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before the Supreme Court of California as real party in interest (Cal.Pub.Util.Code § 1758, which provides in pertinent part:

> "The commission and each party to the action or proceeding before the commission may appear in the review proceeding.")

Having this status, it is the party in interest here and has standing to move to dismiss the appeal for want of jurisdiction. See *Los Angeles v. Pub.Util.Comm'n* (1959) 359 U.S. 119 (per curiam).

2. References herein to appendices are to those appended to the jurisdictional statement. "Jur.St." followed by a page number refers to pages of the text of the jurisdictional statement.

3. Copies of the decisions of the Commission are not appended to the jurisdictional statement as required by Rule 15(h). Copies of such decisions are attached hereto as Appendices 1 and 2.

JURISDICTION

Appellant's petition for rehearing of the Supreme Court's Order denying Writ of Review was denied on November 25, 1975 (Appx. B). A notice of appeal was filed on January 13, 1976 (Appx. C).

Jurisdiction is asserted by appellant under Title 28, United States Code § 1257(2).

Jurisdiction is challenged by this motion.

QUESTIONS PRESENTED

In spite of his tortured presentation of the questions involved on this appeal (Jur. St., pp. 2-5), appellant is apparently challenging the reasonableness of Pacific Telephone's limitation of liability tariff (Rule 14), and the denial of "equal protection of the law and due process of law secured to him by the Tenth [sic] and Fourteenth Amendments of the U.S. Constitution" in proceedings before the Commission and before the California Supreme Court.

Jurisdiction is hereby challenged on the grounds that no one of these contentions presents a substantial Federal question and that the constitutionality of the Rule and the procedures was not raised in or passed upon by the Court below (here the Commission) and thus is not properly before this Court.

STATEMENT OF THE CASE

The facts underlying the complaint can be very simply stated. On June 21, 1972, appellant ordered telephone service and certain directory listings to appear in the alphabetical and classified sections of the September, 1972, San Francisco directory. The listings requested were for the firm name Shade, Faisst & Co., and the individual partners, Ross Shade and William Faisst. Said listings were accepted and printed in the alphabetical section of the directory as well

as in Pacific Telephone's directory assistance records. A listing for the firm name was accepted for the classified section of the directory under the classified heading, "Accountants - Certified Public". This listing was published erroneously under the heading, "Accountants - Public". The last date for the acceptance of the above-mentioned listings was June 28, 1972.

Listings for the individual partners could not be accepted in the classified section of the directory because such listings are items of advertising, and the last date for the acceptance of items of advertising for the September, 1972 San Francisco directory was June 8, 1972.

As a result of its error in publishing the firm name under the classified heading of "Accountants - Public" rather than "Accountants - Certified Public", Pacific Telephone, in accordance with the provisions of its limitation of liability rules, offered to adjust 100% of the basic monthly charges ($35.20 per month plus tax) for appellant's telephone service during the life of the directory including the charges for the individual listings correctly published in the alphabetical section of the directory. Appellant rejected this offer and commenced his action before the Commission. At the same time, appellant commenced a parallel civil action (*Shade et al. v. The Pacific Tel. & Tel. Co.*, Civil No. 664-027 Superior Court, San Francisco, California, filed August 10, 1973) seeking damages for alleged willful misconduct, violation of law and/or gross negligence, which action is still pending.

Hearings were held on December 17 and 18, 1973, and final briefs were submitted on February 14, 1974. On April 29, 1975, the Commission rendered Decision No. 84374 which denied the relief sought by appellant except that it

ordered Pacific Telephone to make the adjustment previously offered which, with interest, totaled $537.46.

On May 9, 1975, appellant sought reconsideration of Decision No. 84374. On July 1, 1975, in Decision No. 84621, the Commission modified its original decision by the inclusion of an additional finding of fact, and denied any further relief. On July 25, 1975, appellant sought reconsideration of Decision No. 84621 as to the additional findings of facts. Further reconsideration of said decision was denied by the Commission by Decision No. 84878 rendered September 3, 1975.

ARGUMENT

I

Appellant's Argument That Pacific Telephone's Limitation of Liability Rules Are Unreasonable and Discriminatory Presents No Substantial Federal Question.

The reasonableness of Pacific Telephone's limitation of liability rules (Rule 14 attached to Appendix 1) has been upheld by the California Supreme Court. Similar limitations have been found reasonable by this Court, the Federal Courts, and other state Courts. In any event, no evidence was presented to impel the Commission to change the rules dealing with the liability of telephone corporations (Appendix 1, p. 6). Furthermore, such issue does not raise a substantial federal question.

California telephone utilities have had tariffs limiting their liability for many years. In 1967, the Commission initiated an investigation into those tariff provisions and after statewide hearings over a period of several years, issued Decision No. 77406 (71 Cal.P.U.C. 229) on June 30, 1970, adopting the tariff provisions which are the subject of this action. The reasonableness of the rules was chal-

lenged before the California Supreme Court in *Waters v. Pacific Telephone Company* (1974) 12 Cal.3d 1 (cited by appellant as 21 Cal.3d 1) 523 P.2d 1161. The court stated at p. 6, n. 5:

> "Both this court and the United States Supreme Court have acknowledged that considerations of public policy which might be applicable to disputes between private parties (see e.g. Civ. Code, § 1668) 'are not "necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body."' (*E. B. Ackerman Importing Co. v. City of Los Angeles*, 61 Cal.2d 595, 599 [39 Cal.Rptr. 726, 394 P.2d 566], quoting from *S.W. Sugar Co. v. River Terminals*, 360 U.S. 411, 417 [3 L.Ed.2d 1334, 1340-1341, 79 S.Ct. 1270].)"

The court went on to say at p. 10:

> "Yet, as we have pointed out (fn. 5, ante), general principles which might govern disputes between private parties are not necessarily applicable to disputes with regulated uitlities. Pacific's use of a credit allowance provision as a means of limiting its liability for ordinary negligence has been considered and approved by the commission, and taken into account in setting its rates. Were the courts permitted to reappraise and reinterpret the language of commission-approved tariff schedules in the guise of 'judicial construction', the supervisory and regulatory functions of the commission set forth above could easily be undermined."

Over 50 years ago, and many times since, this Court has sustained limitation of liability tariffs applying to telegraph messages (*Western Union Telegraph Company v. Esteve Brothers & Company*, (1921) 256 U.S. 566). As recently as 1971, certiorari was denied in a Minnesota case citing the *Esteve Brothers* case and denying liability for more than the tariffed amount in a claim for damages for a delayed

telegraph message (*Komatz Construction, Inc. v. Western Union Telegraph*, (1971) 290 Minn. 129; 186 N.W.2d 691, cert. denied 404 U.S. 856). The *Esteve Brothers* case has been cited and followed in several federal and state cases involving ommissions from telephone directories, all of which upheld the validity of the limitation of liability provisions in filed tariffs (*Georges v. Pacific Telephone and Telegraph Company*, 184 F.Supp. 571 (D. Ore. 1960); *Russell v. Southwestern Bell Telephone Company*, 130 F.Supp. 130 (E.D. Tex. 1955); *Robinson Insurance & Real Estate, Inc. v. Southwestern Bell Telephone Company*, 366 F.Supp. 307 (W.D. Ark. 1973); *Wheeler Stuckey, Inc. v. Southwestern Bell Telephone Company*, 279 F.Supp. 712 (W.D. Okla. 1967); *McTighe v. New England Telephone and Telegraph Company*, 216 F.2d 26 (2d Cir. 1954)). *Robinson, supra*, at 311 cites some 14 states in which simiiar limitations have been upheld either by the state court or by the federal court. The case of *Western Union Telegraph Company v. Priester*, (1928) 276 U.S. 252, cited by appellant (Jur. St., p. 7) in his argument, was cited in *McTighe, supra* at 29 with the *Esteve Brothers* case, *supra* as upholding the validity of limitation of liability provisions in the tariffs of both telephone and telegraph companies. Appellant's arguments that Rule 14 "discriminates against the entire business community" (Jur. St., p. 9), provides the "telephone company with immunity that is not reasonable" (Jur. St., p. 9) and is "wholly unrelated to the objective of the Public Utilities Code" (Jur. St., p. 5) are all answered in the cases cited above which hold that limitation of liability rules are constitutional and legally permissible.

A lengthy annotation in 92 A.L.R.2d 917 enumerates cases in some 18 jurisdictions upholding limitation of liability rules applying to errors in telephone directories. This an-

notation concludes "Either the outright validity and reasonableness of such provisions or their invulnerability to attack in ordinary actions before the courts are very nearly universally established" (p. 921).

The right of a telephone utility to include limitation of liability provisions either in its contracts or in its filed tariffs is settled by the *Esteve Brothers* and *Waters* cases. Appellant's argument to the contrary raises no substantial federal question.

II

Appellant's Arguments That the Limitation of Liability Rules Violate the Equal Protection of the Laws and Due Process Clauses of the Constitution Are Insubstantial and Are Not Properly Before the Court.

Appellant's contention that Pacific Telephone's limitation of liability rules are "repugnant to the equal protection of the law secured to the appellant by the Fourteenth Amendment to the Constitution of the United States" (Jur. St., p. 3) was not made in appellant's complaint to the Commission or in his briefs filed after hearing, but for the first time in his Petition for Writ of Review to the California Supreme Court. It has been held that the judgment of the trial court is that of the highest court of the state for the purpose of a writ of error from the Federal Supreme Court where the highest state tribunal has denied a writ of error to the trial court (*Western Union Telegraph Company v. Crovo,* (1911) 220 U.S. 362). Here the California Supreme Court denied a writ of review without comment or decision. As the federal question was neither raised in nor considered by the Commission in its decision, the contention is not within the jurisdiction of this court (Rule 15, Para. 1(d); Rule 16, Para. 1(b)).

Hearings on appellant's complaint before the Commission were completed on December 18, 1973. Appellant's closing brief was filed on February 11, 1974. In his jurisdictional statement, appellant states "The equal protection of the law and the due process provisions of the Tenth and Fourteenth Amendments of the Constitution of the United States have been included in all petitions that have been filed subsequent to July 9, 1974" (Jur. St., p. 7). On September 12, 1974, some seven months after the date specified for filing of closing briefs, appellant filed with the Commission a document entitled "Petition for Consideration of Additional Arguments Pending a Decision by the Commission". That document for the first time contained two brief references to the Constitution of the United States. The Commission's Decision No. 84374 neither considered nor passed upon any federal questions. It has been consistently held since 1819 that unless it appears on the record that a federal question was raised, preserved or passed upon in the state court below, this court's appellate jurisdiction fails (*Cardinale v. Louisiana,* (1969) 394 U.S. 437, 438-439).

III

Appellant's Argument That He Was Deprived of Due Process Because of a Hearing Before An Examiner and Not Before the Commission Is Equally Insubstantial.

Appellant argues that hearings before the Examiner without provisions for hearings before the Commission and without a hearing before the State Supreme Court "* * * is repugnant to the due process of law as secured by the Tenth Amendment to the Constitution of the United States" (Jur. St., p. 5). We fail to see how the Tenth Amendment, which reserves to the states rights not delegated to the United

States by the Constitution, is apropos here. In any event, this contention is without merit. Though the general rule is that the one who decides must hear, both this Court and the California Supreme Court have held that the requirement of a hearing may be satisfied even though the members of the Commission do not actually hear or even read all the evidence. The obligation of the Commission members is to achieve a substantial understanding of the record by any reasonable means, including the use of an Examiner's summary (*Morgan v. United States,* (1936) 298 U.S. 468, 481; *Allied Compensation Insurance Company v. Industrial Accident Commission,* (1961) 57 Cal.2d 115, 119; 367 P.2d 409; 2 Davis, *Administrative Law Treatise,* §§ 11.02-11.04, pp. 38-57).

CONCLUSION

Since none of appellant's contentions, whether timely or properly raised in the court below or in this Court or not, presents a substantial federal question, none is within the jurisdiction of this Court. In any event, the judgment below is clearly correct under principles well settled by decisions of this Court. We respectfully submit that the appeal should be dismissed or, alternatively, the judgment should be affirmed.

Dated at San Francisco, California, March 16, 1976.

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Attorneys for The Pacific Telephone and Telegraph Company, real party in interest, as appellee.

Appendix 1

Decision No. 84374

Before the Public Utilities Commission
of the State of California

Ross Shade and William H. Faisst, Shade, Faisst & Co., a partnership, Complainants, vs. The Pacific Telephone and Telegraph Company, Defendants.	Case No. 9598

(Filed August 10, 1973;
amended October 23, 1973)

Ross Shade and *William H. Faisst,* for themselves, complainants.

Richard Siegfried, Attorney at Law, for The Pacific Telephone and Telegraph Company, defendant.

OPINION

This is a complaint by Ross Shade (Shade) and William H. Faisst (Faisst) against The Pacific Telephone and Telegraph Company (PT&T). The complaint relates to the limitation of liability provisions in PT&T's tariff and its practices thereunder.

A duly noticed public hearing was held in this matter before Examiner Donald B. Jarvis on December 17 and 18, 1973. It was submitted, after the filing of briefs and transcript, on February 14, 1974. On September 16, 1974, complainants filed a petition to set aside submission[1] seeking to

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1. Complainants entitled the document "Petition For Consideration of Additional Arguments Pending a Decision By the Commission."

submit additional arguments. The Commission has carefully considered the matters raised in the petition and finds that it should be denied.

The facts in this matter are not seriously in dispute.

Findings of Fact

1. Shade and Faisst are certified public accountants. Shade has practiced his profession in San Francisco for 12 years.

2. Commencing January 1, 1971, Shade was associated with Joseph Harb, another CPA. They conducted their business under the name of Harb, Shade & Company. By March of 1972 another associate had been added and the business was conducted under the name of Harb, Shade & Ring. In March, 1972, Harb and Shade agreed to discontinue their partnership as soon as Shade could find appropriate office space at another location.

3. On or about June 1, 1972, Shade discussed the formation of a partnership with Faisst.

4. The closing date for listings in the 1973 San Francisco directory was June 28, 1972. The closing date for advertising was June 8, 1972.

5. It is the practice of PT&T's directory department to change all items of advertising to conform to main listings (white pages) received before the directory closing date.

6. By the middle of June 1972, Shade and Faisst had agreed to form an association and to conduct their business under the name of Shade, Faisst & Company.

7. During June 1972, Shade and Faisst leased office space for their business at 44 Montgomery Street, San Francisco.

8. On June 21, 1972 Shade and Faisst went to PT&T's Bush Street, San Francisco business office. At the business

office Shade first talked by telephone to a PT&T marketing representative who was located in another building. Shade requested a listing under the heading of Accountants - Certified Public for Shade, Faisst & Company and individual listings of the partners names in the yellow pages. The marketing representative informed Shade that PT&T would accept the firm listing which would appear in the yellow and white pages of the 1973 directory, but that the individual listings were considered to be additional advertising and could not be accepted because it was past the closing date for accepting advertising. The marketing representative telephoned the appropriate information to a customer service representative, at the Bush Street office, who prepared a listing agreement form, which Shade signed. The information on the form correctly indicated that Shade, Faisst & Company was to be listed under the yellow page heading of Accountants - Certified Public.

9. The listing for Shade, Faisst & Company was improperly coded by some employee of PT&T to reflect that it should appear under the heading of Accountants - Public. As a result, the listing of Shade, Faisst & Company appeared in the 1973 San Francisco directory under the yellow page heading of Accountants - Public.

10. The failure to list Shade, Faisst & Company under the heading Accountants - Certified Public in the yellow pages of the 1973 San Francisco directory was an error by PT&T. This error diminished usefulness of the listing the one year in which the 1973 San Francisco directory was in use.

11. On April 3, 1972, PT&T accepted an advertising order from Harb, Shade & Ring for three extra lines of

yellow page advertising to provide individual listings for each member of that firm. On June 26, 1972, PT&T received a request from the firm that its listing should be changed to Harb, Levy, Weiland & Ring. PT&T instituted a service order to effectuate the change. On June 30, 1972, the advertising sales department questioned the change because of the lines of information associated with the listing. On July 5, 1972, the firm was contacted by PT&T and advised that the new listing was correct and that the lines of information should reflect the new listing. The 1973 directory yellow pages contained the listing of Harb, Levy, Weiland & Ring, with some corresponding individual listings, under the heading of Certified Public Accountants. No additional individual listings (lines of information) were added.

12. During the years indicated the number of PT&T directory listings, advertising published and errors were as follows:

	1970	*1971*	*1972*
White Page Listings	5,025,000	4,980,000	5,100,000
White Page Errors	3,779	2,963	2,729
Percentage of White Page Errors	.075%	.059%	.054%
Classified Listings and Items of Advertising	1,910,000	2,006,000	2,038,000
Classified Errors	9,709	9,007	8,858
Percentage of Classified Errors	.508%	.449%	.434%
Total White Page and Classified Listings and Advertisements	6,935,000	6,986,000	7,138,000
Total White Page and Classified Errors	13,488	11,970	11,587
Percentage of Errors	.194%	.171%	.162%

13. During the years indicated PT&T's telephone directories had the following number of classified listings, advertisements, and errors:

	1970	*1971*	*1972*
Number of Classified Listings and Advertisements	1,910,000	2,006,000	2,038,000
Total Classified Errors	9,709	9,007	8,858
Number of Listings Under Wrong Heading	401	388	337
Percentage of Errors Under Wrong Heading	.021%	.019%	.017%

14. During the years indicated, PT&T's San Francisco directory had the following number of listings, advertising, and errors:

	1970	*1971*	*1972*	*1973**
White Page Listings	320,649	314,369	312,003	312,170
White Page Errors	482	304	247	168
Percentage of White Page Errors	.150%	.097%	.079%	.054%
Classified Listings and Items of Advertising	126,101	129,569	131,582	134,193
Classified Errors	654	474	543	460
Percentage of Classified Errors	.519%	.366%	.413%	.343%
Total White Page and Classified Listings and Advertising	446,750	443,938	443,585	446,363
Total White Page and Classified Errors	1,136	778	790	628
Percentage of Errors	.254%	.175%	.178%	.141%

*Includes 4th quarter of 1972.

15. Shade, Faisst & Company is entitled to a credit allowance from PT&T in an amount equal to the basic main business exchange rate for a period of twelve months commencing September of 1972. No discrimination will result from the payment of interest on reparations for that amount.

16. Shade, Faisst & Company filed an action in the superior court against PT&T seeking damages in connection with the aforesaid facts. PT&T takes the position in that litigation that there was no gross negligence involved

and has refused to settle the case on a basis other than that of offering complainants a credit allowance.

The material issues in this proceeding are as follows: (1) Should the Commission enter an order changing the rules limiting the liability of telephone corporations? (2) Are complainants entitled to any relief because their firm was listed under the heading Accountants - Public rather than Accountants - Certified Public in the 1973 San Francisco directory? (3) Did PT&T discriminate against complainants by accepting listings and/or items of advertising from other persons after the applicable closing dates for the 1973 San Francisco directory? (4) Are PT&T's practices in connection with the acceptance and transmitting of new listings to its directory department unjust, unreasonable, unproper [sic], inadequate, or insufficient? (5) Did PT&T act in an arbitrary, unjust, or improper manner when it declined to enter into a settlement of the superior court action with complainants on a basis other than that of a credit allowance?

Complainants first contend that the Commission should remove the rules limiting liability of telephone corporations so they can recover in the superior court action damages without limitation against PT&T for the error which is the subject of this complaint. In the *Limitation of Liability* case (1970) 71 CPUC 229, the Commission most recently considered the question of the limitation of liabilities of telephone corporations. After statewide hearings, we held that there was no limitation of liability for tortious conduct, we ordered telephone corporations to adopt tariffs providing for liability in amounts not to exceed $10,000[2] for gross

2. The decision limits liability for gross negligence to $2,000 for telephone corporations having gross revenues of $1,000,000 or less and $10,000 for telephone corporations having gross revenues over $1,000,000.

negligence, and we authorized them to adopt tariff provisions limiting liability for ordinary negligence to specified credit allowances. Complainants' arguments are similar to ones advanced in the *Limitation of Liabilities* case. Complainants *presented no evidence on these issues which would impel us to change the rules dealing with the limitation of liability of telephone corporations.*

Complainants next contend that PT&T acted arbitrarily and improperly by refusing to settle the superior court action filed against it by complainants. There is no merit in this contention. The record indicates that PT&T admits that an error occurred and has offered complainants 100 percent credit allowance for the year in question. PT&T denies that any gross negligence is present under the facts presented. Under the limitation of liability rules, heretofore discussed, *gross negligence is a prerequisite for the maintenance of complainants' superior court action.* Complainants argue that litigants often enter into compromise settlements of lawsuits, even though they believe in the correctness of their position, in order to minimize the cost of litigation. Complainants take the position that PT&T expends more money in defending lawsuits, such as their superior court action, than would be expended if they entered into compromise settlements. They ask the Commission to order PT&T to enter into good faith compromise settlements in such instances, which would benefit PT&T's ratepayers as well as the litigants.

Complainants' contention that the net cost of settling all litigation would be less than the results of prosecuting it is entirely without factual support in this record. Furthermore, mandating such a policy could evoke the filing of numerous nuisance value actions which would inure to the disadvantage of PT&T's ratepayers. Even if it be assumed

that the Commission has jurisdiction to enter the type of order contended for by complainants,[3] the facts in this proceeding do not call for the exercise thereof. Since a superior court action is pending between the parties, we believe it inappropriate to discuss in detail PT&T's refusal to settle that litigation on other than a credit allowance basis.[4] Our examination of the record leads us to find that PT&T did not act improperly, arbitrarily, or unreasonably in refusing to settle the superior court action on a basis other than that of a credit allowance.

The remaining issue to be considered is whether PT&T discriminated against complainants. Public Utilities Code Section 453 provides in part:

3. The Commission has ordered utilities subject to its jurisdiction to prosecute or defend matters cognate and germane to their utility activities. (*PG&E Co.*, etc. (1957) 56 CPUC 66, 67; *PG&E Co.* (1959) 57 CPUC 236, 248; *So. Cal. Gas Co.* (1959) 57 CPUC 250, 259; *So. Cal. Gas Co.* (1959) 57 CPUC 262, 270-71.) If a utility were to engage in a calculated course of unnecessary litigation, the Commission could disallow the expenses thereof in an appropriate rate proceeding. (*Pacific Tel. & Tel. Co. v Public Utilities Commission* (1965) 62 C 2d 634, 659, 668-70.) We express no opinion on the question of whether the Commission could, consonant with due process, order a utility subject to its jurisdiction to compromise its claim or not assert a defense which it in good faith believes to be applicable in a superior court action involving a matter (e.g. awarding damages for gross negligence) over which the Commission has no jurisdiction. We are not here considering situations in which there have been prior Commission orders or factual determinations or in which the Commission has paramount jurisdiction. (*Pacific Tel. & Tel. Co. v Superior Court* (1963) 60 C 2d 426, 430; *Miller v Railroad Commission* (1937) 9 C 2d 190, 195, 197-98; *R. E. Tharp, Inc. v. Miller Hay Co.* (1968) 261 CA 2d 81; *People ex rel Public Utilities Commission v Ryerson* (1966) 241 CA 2d 115; *Pratt v Coast Trucking, Inc.* (1964) 228 CA 2d 139.)

4. In order to award a credit allowance (reparations) it is only necessary to determine that a mistake, error or omission, etc. occurred. (71 CPUC 229, 251 *et seq.*) The Commission does not award damages for gross negligence. (*Waters v Pacific Telephone Company* (1974) 12 C 3d 1, 8-9.)

> "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."

Complainants base their charge of discrimination on the fact that PT&T changed the lines of information listings for Harb, Levy, Weiland & Ring after June 8, 1972 but would not sell Shade, Faisst & Company lines of information after that date.

The Commission finds that no discrimination occurred under the facts herein presented. "Whenever a line must be drawn, there is little that separates the cases closest to it on either side." (*Wood v Public Utilities Commission* (1971) 4 C 3d 288, 296; appeal dismissed for want of substantial federal question 404 U.S. 931.) Common sense indicates that if PT&T is to publish and distribute directories annually, deadlines must be established. The establishment of an earlier deadline for advertising (including informational listings) than for regular listings does not appear to be unreasonable. Since there is also a deadline for listings, the practice of changing advertising to conform to listings is also not unreasonable. There is a difference in making changes within directory advertising space already allocated and adding additional content requiring more space. As indicated, PT&T accepted an advertising order on April 3, 1972 for lines of information for the then firm of Harb, Shade & Ring. This was before the June 8, 1972 cutoff date for acceptance of advertising. On June 26, 1972, the firm changed its main listing and asked that the lines of information reflect the new listing. No additional lines of information were added. The June 26th request was before the June 28, 1972 cutoff date. Under these facts, no discrimination occurred.

No other points require discussion. The Commission makes the following additional findings and conclusions.

Findings of Fact

17. There is no evidence in this record which would require the Commission to change the rules dealing with the liability of telephone corporations as set forth in the *Limitation of Liability* case 71 CPUC 229.

18. PT&T did not act improperly, arbitrarily, or unreasonably in refusing to settle the superior court action which complainants brought against it on a basis other than that of a credit allowance.

19. PT&T did not discriminate against complainants when it refused to accept advertising (lines of information) on June 21, 1972, for publication in PT&T's 1973 San Francisco directory.

Conclusions of Law

1. PT&T should be ordered to grant Shade, Faisst & Company a credit allowance in an amount equal to the main business exchange rate for the period of one year commencing September 1972, with interest at the rate of 7 percent per annum from September 1973 to the payment or crediting thereof.

2. Complainants are entitled to no other relief in this proceeding.

ORDER

IT IS ORDERED that The Pacific Telephone and Telegraph Company shall grant Shade, Faisst & Company a credit allowance in an amount equal to the main business exchange rate charged Shade, Faisst & Company for the period of one year commencing September, 1972. The credit allowance shall bear interest at the rate of 7 percent per annum from September 1973 to the date of payment thereof

(if paid in cash) or the date credited against accrued outstanding charges.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 29th day of April, 1975.

Vernon L. Sturgeon
President
William Symons, Jr.
D. W. Holmes
Leonard Ross
Robert Batinovich
Commissioners

Appendix 2

Decision No. 84621

Before the Public Utilities Commission
of the State of California

Ross Shade and William H. Faisst, Shade, Faisst & Co., a partnership, Complainants, vs. The Pacific Telephone and Telegraph Company, Defendants.	Case No. 9598

(Filed August 10, 1973;
Amended October 23, 1973)

ORDER DENYING RELIEF

On May 9, 1975, complainants, Ross Shade and William H. Faisst filed a "Petition for Reconsideration and to Amend Decision No. 84374". Attached to this filing is a document entitled "Petition Requesting the Public Utilities Commission to Withdraw Decision No. 84374 Forthwith".

We have considered fully the assertions and arguments presented and, except for the discussion immediately following, are of the opinion that good cause for relief has not been made to appear.

In Decision No. 84374 we specifically recognized that The Pacific Telephone and Telegraph Company's (PT&T) practices in connection with the acceptance and transmission of new listings to its directory department were a material issue. After reviewing the instant filing and the record herein, we are of the opinion that PT&T's practices in this regard are not unjust, unreasonable, improper, inadequate or insufficient.

PT&T's procedures were fully described at the hearings. Exhibit No. 14 is a flow chart which shows the carefully drawn steps developed to handle new listings. A minor change did occur in new listing procedures between 1972 and the present. However, we are unable to find fault with either the past or present procedures.

In the instant filing, petitioners specifically refer to (1) information given them regarding cut-off dates for listings and (2) the preparation and use of "contract memoranda" and "listing agreement forms" by PT&T. We cannot, based on the record established, find that these matters evidence a shortcoming in PT&T's procedures.

THEREFORE, IT IS ORDERED that:

1. Decision No. 84374 is hereby modified by the inclusion therein of the following findings of fact:

> "20. PT&T's practices in connection with the acceptance and transmitting of new listings in its directory department have not been shown to be unjust, unreasonable, improper, inadequate or insufficient."

2. Further relief with respect to Decision No. 84374, as modified hereinabove, is hereby denied.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 1st day of ....., 1975.

D. W. Holmes
President
William Symons, Jr.
Vernon L. Sturgeon
Robert Batinovich
Commissioners

Commissioner Leonard Ross, being necessarily absent, did not participate in the disposition of this proceeding.